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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 828

ELDON C. ODEKIRK,

Petitioner,

vs.

SEARS ROEBUCK & CO., A CORPORATION, AND VAUGHN & BUSHNELL MFG. CO., A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Eldon C. Odekirk, prays that a writ of *certiorari* issue to the United States Court of Appeals for the Seventh Circuit, to the end that its judgment in the above-captioned cause may be reviewed by this Honorable Court.

OPINION BELOW.

The opinion and judgment of the United States Court of Appeals has not, as yet, been reported, but is printed in Appendix A, *infra*, pages .....

JURISDICTION.

The judgment of the Court of Appeals was entered and its opinion handed down on February 5, 1960. Petition for rehearing was denied March 3, 1960. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the trial court, having elected to require the jury to return a special verdict and not a general verdict, by failing to require the jury to return "a special written finding upon each issue of fact," in accordance with the requirements of Rule 49(a) of the Federal Rules of Civil Procedure, deprived the petitioner of his constitutional right to a jury trial.

This is a controlling question in the case but was wholly ignored by the Court of Appeals.

The pleadings and the proof raised issues of fact with respect to breaches of express and implied warranties on the part of the respondents, and also issues of fact with respect to specific charges of negligence laid against each of them, upon none of which issues of fact was the jury required to return a special finding. These issues of fact are left wholly undetermined by the special verdict returned by the jury.

2. Whether the trial court by requiring the jury to return special findings upon certain supposed issues which were neither raised by the pleadings nor by the proof, deprived the petitioner of his constitutional right to a jury trial.

The petitioner predicated his action against the respondent, Sears Roebuck & Co., on the breach of certain express and implied warranties with respect to a certain carpenter's hammer which he had purchased from it, and on certain

specific acts of negligence in the manufacture and sale of said hammer. The trial court, however, failed to require the jury to return special findings upon any of these issues, but, on the contrary, required the jury to return findings upon certain supposed issues of misrepresentation and deceit.

3. Whether the trial court in instructing the jury, particularly as to the burden of proof and the preponderance of the evidence, is required to follow the law of Illinois.

This is a diversity case tried by a Federal court sitting in Illinois.

The trial court, in its instructions to the jury, repeatedly used the terms "satisfy," "convince," "convincing," and "convincing power" with respect to the degree of proof required, and in referring to the burden of proof on the part of the petitioner, used the term "convinced" fourteen times.

The Court of Appeals concedes that it would have been reversible error to give these instructions had the case been tried in an Illinois court. It held, however, that in this the trial court was not required to follow the Illinois law,—that the "federal court will proceed by its own rules of procedure, acquired from the federal government, . . ."

4. Whether a finding that there is, in the record, evidence of contributory negligence on the part of the petitioner, precludes recovery.

The petitioner sought recovery on two theories: first, that his injuries were caused by the respondents' breach of certain express and implied warrants, and, second, that they were caused by certain specific acts of negligence on the part of the respondents.

As to the warranty issues, negligence is not ordinarily a defense.

As to the negligence issues, the cause of action having

arisen in the State of Wisconsin, under the Comparative Negligence Statute of that state (Wis. Stats., Chap. 331, Sec. 331.045), petitioner is not precluded from recovering unless his causal negligence is greater than that of the respondents.

STATUTES INVOLVED.

Rule 49(a) of the Federal Rules of Civil Procedure, provides:

> "Rule 49. Special Verdicts and Interrogatories.
>
> "(a) **Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

The Wisconsin Statutes, 1953, Chapter 121, Section 121.15, Vol. 1, p. 1984, provides:

> "121.15. **Implied Warranties of Quality and Fitness.** Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any par-

ticular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

"(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

The Wisconsin Statutes, 1953, Chapter 121, Section 121.12, Vol. 1, p. 1983, provides as follows:

"121.12. **Definition of Express Warranty.** Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

The Wisconsin Statutes, 1953, Chapter 331, Section 331.045, Vol. 2, p. 3343, provides:

"331.045. **Comparative Negligence; When Bars Recovery.** Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering."

STATEMENT OF THE CASE.

The basis for Federal jurisdiction in the court of first instance is diversity of citizenship, 28 U. S. C., Section 1332, the petitioner being a citizen of the State of Wisconsin, the respondent, Sears Roebuck & Co., a corporation, a citizen of the State of New York, the respondent Vaughn & Bushnell Mfg. Co., a corporation, a citizen of the State of Illinois, and the matter in controversy exceeding the sum or value of $10,000.00 exclusive of interest and costs.

By his action, the petitioner seeks to recover damages for personal injuries sustained on July 11, 1954. At the time of the occurrence he was a resident of Campbellsport, a village located about 13 miles from Fond du Lac, Wisconsin (App. 20). He had purchased the village schoolhouse, a frame building, intending to convert it into a dwelling for himself and family (App. 20). He did not have the tools with which to do the work and consulted the catalog of the respondent, Sears Roebuck & Co., for the purpose of selecting such tools as he might need to do this reconstruction (App. 22). On about July 1, 1954, he went to the respondent's store at Fond du Lac, purchased a carpenter's rip hammer, a plane and a saw, described in the catalog, and bought some nails. Three or four days later, he ordered two stepladders and another such hammer through the respondent's mail order department. These he received about July 9. The two hammers were identical and were sold to the petitioner bearing the respondent's "Craftsman" brand and trade name (App. 24). Both hammers were produced at the trial and were received in evidence as petitioner's exhibits 2 and 7.

On July 11, 1954, accompanied by his two nephews the petitioner proceeded to the schoolhouse to do some work. He sent the boys up into the attic to knock down the plaster and lathe, preparatory to lowering the ceiling of the building. Just below the stringers, and running the length of the building, was a 1 x 4 inch board which was nailed to the studding and which it was necessary to remove in order to lower the stringers. The board was a good board and the petitioner wished to save it. Accordingly, he improvised a scaffold by the use of the two ladders with a plank between, climbed upon the scaffold with the two hammers, and placed the claws of one near the head of a nail to be removed, intending to drive them under the nail head by striking that hammer with the other (App, 26). On the second impact, he felt an object enter his left eye. Thereupon, he turned both hammers face up and found that a chip was missing from the one he was holding in his right hand. His eye was numb and all he could see with it was a swirling gray mass (App. 28).

He was taken to the hospital at Fond du Lac, Wisconsin, where x-rays were taken which disclosed a piece of metal 5 x 3 x 2 mm. lodged in the back of the eye-socket just to the side of the optic nerve (App. 76). The chip had passed through his eyeball, destroying the lens, and impairing the vision to such an extent that he is industrially blind in that eye (App. 77).

The hammers in question were manufactured by the respondent, Vaughn & Bushnell Mfg. Co., and in their production the head was known as a 7½ Rip Hammer (App. 41). They were manufactured for, and sold to, the respondent, Sears Roebuck & Co., for resale to the public under its Catalog No. 9H3616.

The hammer which chipped (petitioner's Exhibit No. 2) was examined by Dr. David Joseph Mack, Professor of Metallurgical Engineering at the University of Wisconsin

(App. 85). Dr. Mack made an extended metallurgical examination of the hammer head and found a very appreciable amount of dirt segregated therein and some cracks on the beveled or chamfered edge of the striking end (App. 111). The examination also showed a segregated area extending from the place where it chipped, across the striking surface and through that end of the hammer head (App. 91-94). According to Dr. Mack, the dirt segregated in the hammer decreased the shock resistance or the impact strength enormously (App. 101).

In his complaint, the petitioner charged:

> "That the defendants, and each of them, expressly and impliedly warranted to the public, including the plaintiff here, that the said 'Craftsman' hammers including the certain 'Craftsman' hammer hereinafter referred to, were manufactured and fabricated from a good and proper grade of tool steel, properly forged, tempered and constructed in good workmanlike manner, reasonably fit for the purposes for which such hammers are used, and that they were free of any defects which would render them inherently or imminently dangerous,"

and that the defendants, and each of them breached their said warranties (App. 10-11).

The petitioner also charged in his complaint:

> "13. That the defendant, Vaughn & Bushnell Manufacturing Co., a corporation, failed in its aforesaid duty and was guilty of one or more of the following acts, as a proximate result of which the plaintiff was injured and damaged:
>
> "(a) Carelessly and negligently, and improperly manufactured and fabricated the aforesaid hammer;
>
> "(b) Carelessly and negligently failed to use a good and proper grade of steel in the manufacture and fabrication of said hammer;

"(c) Carelessly and negligently manufactured and fabricated the said hammer from grossly segregated and defective steel stock;

"(d) Carelessly and negligently failed to properly inspect said hammer before allowing the same to be sold;

"(e) Carelessly and negligently failed to properly test the said hammer before allowing the same to be sold;

"(f) Carelessly and negligently and improperly tempered said hammer in the process of manufacturing and fabricating the same;

"(g) Carelessly and negligently allowed, caused and permitted the said hammer, which was in a dangerous and defective condition, to be sold.

"14. That the defendant, Sears Roebuck & Co., a corporation, failed in its aforesaid duty and was guilty of one or more of the following acts, as a proximate result of which the plaintiff was injured and damaged:

"(a) Carelessly, negligently and improperly permitted the said hammer to be improperly manufactured and fabricated;

"(b) Carelessly and negligently permitted the said hammer to be manufactured and fabricated from grossly segregated and defective steel stock;

"(c) Carelessly and negligently failed to properly inspect the said hammer before allowing the same to be sold to the plaintiff;

"(d) Carelessly and negligently failed to properly test the said hammer before selling the same to the plaintiff;

"(e) Carelessly and negligently sold the said hammer to the plaintiff while the same was in a dangerous and defective condition;

"(f) Carelessly and negligently sold to the plaintiff an inherently and imminently dangerous instrumentality, to-wit: the said hammer." (App. 12-13.)

The respondents, in their answer, denied these charges and further alleged "that if they, or either of them, were guilty of any of the alleged careless or negligent acts charged against them in the plaintiff's complaint, which they and each of them deny, then the plaintiff was guilty of 50% or more of contributory careless or negligent acts which resulted in his alleged injuries, and under the law of the State of Wisconsin the plaintiff is precluded from recovering from the defendants, or either of them, any amount whatever" (App. 17).

At the close of the evidence, the respondents filed written motions to strike the several charges laid against them in the petitioner's complaint. These motions the court denied (App. 136).

The Court then stated:

"I have attempted with the aid of one or two of my conferees in Milwaukee, in the District Court there, to prepare these instructions in accordance with the law of the tate of Wisconsin, which is applicable here. I will give each of you, as I say, a copy of the charge and over the noon hour you may become familiar with it and with the questions to be propounded,"

and instructed counsel that their argument should be limited to the eleven questions involved (App. 137).

The interrogatories and accompanying instructions given by the trial court will be found on pages 138-153 of the Appendix.

As appears from the trial court's charge to the jury, the only interrogatories purporting to touch on the liability of the respondents, are:

1. Did the defendant, Sears Roebuck & Co., through its catalog and/or its agents and servants, misrepresent the qualities of the hammer in question to plaintiff? (App. 144.)

2. If you answer "Yes" to question No. 1, then answer this question: Was the defendant, Sears Roebuck & Co., negligent in making such representations with respect to the qualities of the hammer in question? (App. 144.)

3. If you answer "Yes" to question No. 2, then answer this question: Was the negligence of Sears Roebuck and Co., as found by you in answer to question No. 2, an efficient cause of the accident and plaintiff's injuries with respect to the qualities of the hammer in question? App. 145.)

6. Was the defendant, Vaughn & Bushnell Mfg. Co., negligent in its manufacture of the hammer in question? (App. 147.)

7. If you answer question No. 6, "Yes" then answer this question: Was the negligence of Vaughn & Bushnell Mfg. Co., as found by you in answer to question No. 6, an efficient cause of the accident and plaintiff's injuries with respect to the qualities of the hammer in question? (App. 147.)

The interrogatories and accompanying instructions were objected to by counsel for both the petitioner (App. 155, *et seq.*) and for the respondents (App. 160, *et seq.*). These objections the trial court overruled.

Upon the return of the special verdict, the Court entered judgment for the respondents. The petitioner's post-trial motion (App. 181-202) was denied.

ARGUMENT.

Whether the construction placed upon Rule 49(a) of the Federal Rules of Civil Procedure by the Court of Appeals deprived the petitioner of the right to a jury trial, guaranteed him by the Seventh Amendment to the Federal Constitution, is a question, not only of importance to the petitioner here, but of such importance that it should be settled by this Honorable Court.

If the opinion of the Court of Appeals is allowed to stand and is to be followed, a trial judge, by electing, as permitted by Rule 49(a), to require the jury to return a special verdict may, by submitting to the jury a few general interrogatories, none of which require a "special finding" on any particular "issue of fact," raised by the pleadings, and by repeated instructions that if the jury is not "convinced" or "satisfied" it must answer the interrogatories adversely, induce the jury to return answers in accordance with his own notions as to how the case should be decided, thus depriving the losing party of a jury trial.

Rule 49(a) was not promulgated or designed to dispense with a jury trial, nor to relieve the jury of its duty to determine all questions of fact, nor to permit the trial judge to limit the issues of fact on which the jury is to make findings. There can be no fewer issues of fact for the jury where a special verdict is required than where the jury is required to return a general verdict. Where the special verdict is required, the issues of fact are submitted to the jury separately, usually by an interrogatory directed to each issue of fact. Where the general verdict is required, the same findings are to be made under appropriate instructions as to the law governing the case.

Rule 49(a) of the Rules of Civil Procedure sets up the conditions under which a special verdict may be required. It specifically provides that it shall be "in the form of a special written finding upon *each* issue of fact," i.e., "the several special findings which might properly be made under the pleadings and the evidence." The findings required are special and not general, and must be made as to *each* issue of fact. A special verdict which does not conform to these specific requirements is no verdict at all, and if accepted by the court, the aggrieved party is denied the right to a jury trial.

The interrogatories submitted to the jury by the trial court did not conform to the requirements of Rule 49(a). The petitioner, in his complaint, proceeded on two theories: First, that each of the defendants breached certain express and implied warranties with respect to the hammer in question, and, second, that each of the defendants was guilty of certain specific acts of negligence, which were a proximate cause of his injuries. Each of these charges raised an issue of fact, with respect to which, under the provisions of Rule 49(a), the petitioner was entitled to have the jury make a special written finding.

None of these issues of fact was submitted to the jury by the interrogatories propounded. The only interrogatory which could be said to remotely relate to any of these issues of fact was the omnibus question by which the jury were asked: "Was the defendant, Vaughn & Bushnell Mfg. Co., negligent in its manufacture of the hammer in question?", a question calculated to defeat the requirements of Rule 49(a), that the jury return a "special written finding upon each issue of fact."

No interrogatories were submitted with respect to the warranty issues or the charges of negligence laid against the respondent, Sears Roebuck & Co. The interrogatories submitted to the jury, therefore, did not conform to the

requirements of Rule 49(a) and were wholly insufficient. The answers thereto did not constitute a special verdict and are of no significance. There was, therefore, no verdict at all. This the Court of Appeals could not pass over as of no importance.

There seems to be no decision of this Court construing the provisions of Rule 49(a). However, there are a number of decisions by other Courts of Appeals and in each of them the decision has been directly contrary to that in the instant case. These courts have uniformly held that where the trial court submits to the jury some but not all of the issues of fact raised by the pleadings, a judgment entered on its findings is erroneous. In *United States Fidelity & G. Co.* v. *Commercial Nat. Bank*, 55 F. 2d 564, the Court stated at page 567:

> "It is fundamental in the Federal courts that 'where a special verdict is rendered, all the facts essential to entitle a party to judgment must be found, and a judgment rendered on a special verdict failing to find all the essential facts is erroneous.' *Ward* v. *Cochran*, 150 U. S. 602, 11 S. Ct. 230, 233, 37 L. ed. 1195; *Mounger* v. *Wells* (C. C. A.), 30 F. 2d 521."

In *Tillman* v. *Great American Indemnity Co.*, 270 F. 2d 588, the Court stated at page 593:

> "When the trial court utilizes the device of a special verdict, although he has wide discretion as to the form and contents of the questions, he should, especially when requested to do so, submit questions or interrogatories covering all the issues raised by the pleadings."

See to the same effect, *Maruska* v. *Maruska*, 155 F. 2d 302 at 304; *Mickey* v. *Tremco Mfg. Co.*, 226 F. 2d 956 at 957; *Angelina Casualty Co.* v. *Bluitt*, 235 F. 2d 764 at 770; and *Skidmore* v. *Baltimore & O. R. Co.*, 167 F. 2d 54 at 66.

Even were the law of Wisconsin controlling, as the trial court apparently thought it to be, the interrogatories pro-

pounded, failed to comply with the law of that state. As was stated by the Court in *Rowley* v. *Chicago, M. & St. P. R. Co.*, 135 Wis. 208, the Court stated at page 216:

> "This Court has several times held that where special acts of negligence are charged in the complaint, denied by the answer, and litigated on the trial, a special verdict should contain specific questions covering these alleged acts, and that the submission of a general question simply asking whether the defendant was guilty of want of ordinary care which proximately caused the plaintiff's injury, is not a compliance with the special verdict statute and will be error, at least where the proper specific questions are requested. *Lee* v. *C., St. P., M. & O. R. Co.*, 101 Wis. 352, 77 N. W. 714; *Bigelow* v. *Danielson*, 102 Wis. 470, 78 N. W. 559; *Schrunk* v. *St. Joseph*, 120 Wis. 223, 97 N. W. 946; *Olwell* v. *Skobis*, 126 Wis. 308, 105 N. W. 777. The reason is quite plain. The statute contemplates the right of the party to a separate finding of the jury upon each specific question of fact."

And, as was said in *Schumacher* v. *Wolf*, 247 Wis. 607, at page 614, quoting from its decision in *Devine* v. *Bischel*, 215 Wis. 331, 334, 254 N. W. 521:

> "As this Court has said: 'It is the function of a special verdict to secure a finding by the jury on each question litigated. In negligence cases each ground of negligence constitutes a distinct litigated question, and proper practice requires that the jury be given an opportunity to find specially with reference to each particular ground of alleged negligence' • • • Since the enactment of Sec. 331.045, Stats., relating to comparative negligence, it is even more important, wherever that statute is applicable, to ask specific findings as to every set of ultimate facts upon which negligence is predicated • • • To enable the jury, in the first instance, to properly compare the negligence of the respective parties, and to enable the court, finally, to pass upon the jury's determination in that respect on the motions after verdict, it is necessary to first have

> the jury's finding as to every set of facts which could constitute causal negligence. * * * Manifestly, in view of the omnibus form of the question, it is impossible to determine what particular set of facts as to negligence on the part of the respective parties entered into the comparison which the jury were required to make, and, consequently, the verdict is too indefinite to enable the court to pass upon the jury's findings as to comparative negligence."

See also *Cook* v. *Wisconsin Telephone Co.*, 263 Wis. 56, at 62, *Omer* v. *Risch*, 275 Wis. 578 at 582; *Wawrzyniakowski* v. *Hoffman & Billings Mfg. Co.*, 146 Wis. 153 at 167 and 168, and *Odya* v. *Quade*, 4 Wis. 2d 63 at 75.

While Rule 49(a) specifically prescribes that a special verdict must be "in the form of a special written finding upon each issue of fact," the case of *Schumacher* v. *Wolf*, 247 Wis. 607, points out, in that part of the opinion quoted above, an additional reason why a special verdict should comply with this rule. The petitioner's right to recover, in the instant case, is governed by the law of Wisconsin. If contributory negligence there was on his part, he is not, under the Wisconsin statute, Wis. State., Chap. 331, Sec. 331.045, precluded from recovering if such negligence was not as great as that of the respondents. Consequently, in order to make the comparison it is necessary that the jury find specially as to each set for facts which would constitute casual negligence.

That such comparison cannot be made from answers to omnibus questions, and unless the acts of negligence are determined separately, was also pointed out in the case of *Katila* v. *Baltimore & O. R. Co.*, 104 F. 2d 842 at page 843.

The interrogatories submitted to the jury by the trial court are insufficient, are not in accordance with the rule 49(a), and the judgment entered on the answers thereto is erroneous. By affirming this judgment the Court of Appeals has denied the petitioner the right to a jury trial.

II.

As above stated, the petitioner sought recovery on the theory that each of the respondents had breached certain express and implied warranties with respect to the hammer in question, and that each was guilty of certain specific acts of negligence which were the proximate cause of his injuries. At the close of the evidence, the trial court overruled the several motions of the respondents to strike these charges, thus holding that there was evidence in the record tending to support each of them.

As to the denfendant, Sears Roebuck & Co., the only interrogatories submitted to the jury were:

> "1. Did the defendant, Sears Roebuck & Co., through its catalog and/or its agents and servants misrepresent the qualities of the hammer in question to the plaintiff?
>
> "2. If you answer 'Yes' to Question No. 1, then answer this question: 'Was the defendant, Sears Roebuck & Co., negligent in making such representations with respect to the qualities of the hammer in question'?" (App. 144.)

Whether Sears Roebuck & Co. negligently misrepresented the qualities of the hammer in question, was not an issue in the case. It was neither pleaded nor was any attempt made to prove that such was the fact. The answers to these questions could not be determinative of either the warranty charges or the charges of specific negligence laid in the complaint.

Not a single issue of fact raised by the charges laid in the petitioner's complaint against the respondent, Sears Roebuck & Co., was submitted to the jury by the interrogatories propounded. The answers returned by the jury could not respond to these issues and the petitioner's action against this respondent is left wholly undermined.

Under the Wisconsin statute, Wis. Stats., Chap. 121, Sec. 121.15, the defendant impliedly warranted that the hammer in question was reasonably fit for use as such and that it was of merchantable quality. The representations made by the respondent in its catalog are by the Wisconsin Statute, made express warranties, Wis. Stats., Chap. 121, Sec. 121.12.

Apparently, the trial court, in drafting its interrogatories failed to distingush between an action predicated on misrepresentation and deceit and one predicated upon breach of warranties. The Court of Appeals adopted this error. Nowhere in its opinion does it give consideration to the warranty issues, or the failure of the trial court to submit these issues to the jury, other than to concede that they were raised in the petitioner's brief.

There is a clear distinction between an action predicated on misrepresentation and deceit and an action predicated on breach of warranties. 55 C. J. 660, Sales, Sec. 676; *McCarty* v. *Williams*, 58 Ind. App. 440 at 444, 108 N. E. 370 at 372; and *Slappen* v. *Bowen*, 122 U. S. 575 at 578. The answers to the interrogatories with respect to whether the respondent, Sears Roebuck & Co., negligently misrepresented the qualities of the hammer to the petitioner, could not be dispositive of the warranty issues, much less of the negligence charges laid in the petitioner's complaint.

The failure of the trial court to submit these issues to the jury, deprived the petitioner of a jury trial with respect to the respondent, Sears Roebuck & Co.

III.

The opinion of the Court of Appeals indicates clearly that the question of whether a Federal court, sitting in Illinois, is required, in its instructions to the jury, particularly as to the burden of proof and preponderance of

the evidence, to follow the law of Illinois, needs further clarification by this Honorable Court.

With respect to the supposed issues, as the trial court conceived them to be and as submitted to the jury, the instructions accompanying the interrogatories, virtually instructed the petitioner out of court.

This is particularly true with respect to the instructions on the burden of proof and the preponderance of the evidence. After giving to the jury a perfunctory and erroneous statement of the issues, the Court told the jury that it would be given certain questions to be answered. Thereupon the Court instructed the jury as follows:

> "In the course of these instructions the terms 'burden of proof' and 'preponderance of the evidence' will be used.
>
> "I shall, during the course of these instructions, designate the party upon whom the 'burden of proof' rests with reference to the respective questions. When you are instructed that the burden of proof rests upon a party, it means that the duty devolves upon that party to satisfy or convince the minds of the jury by a clear preponderance of the evidence of the truth of the party's contention.
>
> "By 'preponderance of evidence,' is meant the evidence which possesses greater weight or convincing power. The evidence of the party upon whom the burden of proof rests must satisfy or convince the minds of the jury before the burden of proof is discharged." (App. 140-1.)

These instructions were referred to and parts thereof repeated in connection with the several questions propounded throughout the charge. As a matter of fact, the Court, in its charge, repeatedly used the terms "satisfy," "convince," "convincing," "convincing power," with respect to the degree of proof required, and in referring to the burden of proof on the part of the plaintiff, used the term "convinced," fourteen times (App. 138-153.)

The Circuit Court of Appeals apparently concedes that the giving of these instructions would have been reversible error had the case been tried in an Illinois court, and such is the well-settled law of Illinois.

In *Teter* v. *Spooner*, 305 Ill. 198, the Court stated at page 210:

> "In civil cases the burden of proof which rests upon the party holding the affirmative of the issue is to prove the issue by a preponderance of the evidence, and it is error to give an instruction to the jury which imposes a greater burden, such as to convince the jury, or to satisfy the jury, or to prove to the satisfaction of the jury. All that is required of the party having the burden of proof is to prove the issue by a preponderance of the evidence."

In *Sonnemann* v. *Mertz*, 221 Ill. 362, the Court stated at page 366:

> "It is always error to instruct a jury in a civil case that the party having the burden of proof must furnish evidence which will satisfy the jury, and instructions of this character have so often been condemned that the rule is well understood and firmly established. *Herrick* v. *Gray*, 83 Ill. 85; *Graves* v. *Colwell*, 90 id. 612; *Ruff* v. *Jarrett*, 94 id. 475; *Rolf* v. *Rich*, 149 id. 436."

See to the same effect, *Sharp* v. *Brown*, 349 Ill. App. 269, 273; *Hughes* v. *Medendorp*, 294 Ill. App. 424, 429; *Hurzon* v. *Schmitz*, 262 Ill. App. 337, 339; *Nelson* v. *Fehd*, 203 Ill. 120, 67 N. E. 828; *McGuire* v. *Guthman Transfer Co.*, 234 Ill. 135, 84 N. E. 723, and cases therein cited. Following virtually every interrogatory submitted to the jury the Court gave the following, or a similar instruction:

> "If the plaintiff has convinced you by a preponderance of the credible evidence that this question should be answered 'Yes' you will so answer it. If you are not so convinced you will answer it 'No'."

The Court of Appeals, however, held that the trial court was not bound to follow the procedural law of Illinois, stating:

> "The procedural law is the law of the forum. The forum here is a federal district court, not a court of the state of Illinois. Although a state-created right may be enforced in a federal court because of diversity of citenship, the federal court will proceed by its own rules of procedure, acquired from the federal government, * * *," citing *Byrd* v. *Blue Ridge Co-op.*, 356 U. S. 525. (See, *infra*, p. 34.)

The *Byrd* case, however, it is respectfully submitted, does not support this conclusion. The principal question in that case seems to have been whether the decision of a factual issue by the court and not by the jury, in accordance with the practice followed by the courts of South Carolina, deprived the petitioner of its constitutional right to a jury trial. The Court held that it might, reversed the judgment below and remanded the cause with certain directions which are not material here. The question of the burden of proof or preponderance of the evidence was not involved.

The conclusion arrived at by the Court of Appeals, it is submitted, is directly contrary to the law as laid down in *Erie* v. *Tompkins*, 304 U. S. 64, and the cases following it. In the *Erie* case this Court said at page 78:

> "Except in matters governed by the Federal Constitution or by acts of Congress, *the law to be applied in any case is the law of the state.* And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of Federal concern. *There is no Federal general, common law.* Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon any Federal court." (Emphasis supplied.)

The law governing the burden of proof and the preponderance of the evidence was, therefore, the law of Illinois. See *Cities Service Oil Co.* v. *Dunlap et al.*, 308 U. S. 208 at 212, and *Palmer* v. *Hoffman*, 318 U. S. 115 at 116-117.

In *State Mutual Life Assurance Co.* v. *Wittenberg*, 239 F. 2d 87, the Court stated at page 89:

> "A Federal court exercising jurisdiction by virtue of diversity of citizenship must, in determining a burden of proof question, apply the law of the state wherein the court is sitting. *Erie R. Co.* v. *Tompkins*, 1939, 304 U. S. 64, 58 S. Ct. 817, 87 L. Ed. 1188; *Cities Service Oil Co.* v. *Dunlap*, 1939, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 196; *Ft. Dodge Hotel Co. of Ft. Dodge* v. *Bartlet*, 8 Cir., 1941, 119 F. 2d 252."

Nor could the prejudicial effect of these instructions be eliminated by considering the instructions as a whole, as concluded by the Court of Appeals. It is, of course, a familiar rule that where a general verdict is to be returned and the jury are instructed on the whole of the law of the case, an erroneous instruction may be corrected by others in the series or its prejudicial effect minimized to such an extent that the error is harmless. But that could have no application here, where practically every instruction given to the jury contains the same errors of law. The chief difficulty in the reasoning of the Court of Appeals is that the jury are not instructed generally and there is no series of instructions where a special verdict is required. To instruct the jury generally would defeat the purpose of the special verdict. Rule 49(a) provides:

> "The court shall give to the jury such explanation and instruction concerning the matters thus submitted as may be necessary to enable the jury to make its finding upon each issue."

Thus there is no series of instructions or general charge given to the jury when a special verdict is required, and

the cases cited by the Court of Appeals in support of the supposed rule could have no application.

Since the instructions were prejudicially erroneous and contrary to the law of Illinois, and since the trial court is required to instruct the jury on the burden of proof and the preponderance in accordance with the law of Illinois, the error in giving these instructions cannot be justified. This error can only be corrected by a reversal of the judgments below and the remanding of the cause to the trial court for a new trial with directions that such retrial, if the Court elects to require the jury to return a special verdict, the interrogatories comply with the requirements of Rule 49(a) and that the jury be instructed in accordance with the law of Illinois.

IV.

The fact, if it be the fact, that the petitioner was guilty of contributory negligence, as found by the Court of Appeals, would not necessarily preclude the petitioner from recovering.

The occurrence resulting in the petitioner's injuries took place in the State of Wisconsin and his right to recover is governed by the law of that state. Under the Comparative Negligence Act of that state, Wis. Stats., Chap. 331, Sec. 331.045, contributory negligence does not bar a recovery, if such negligence was not as great as the negligence of the persons against whom recovery is sought. Consequently, before petitioner could be barred from recovering, the jury must find that he was guilty of as much as 50% of the total causal negligence resulting in his injuries.

In its opinion, the Court of Appeals concluded that because the jury had answered Interrogatory No. 8: "Was the plaintiff, Eldon C. Odekirk, negligent in the manner he was using the particular hammer at the time of the accident in question?" (App. 148), in the affirmative, and in its

answer to Interrogatories No. 10 (App. 150) apportioned 100% of the causal negligence to the petitioner, he was not entitled to recover.

The Court of Appeals, however, refused to take into consideration the insufficiency of the interrogatories submitted to the jury, the fact that under the instructions given in connection with such interrogatories as were propounded by the Court purportedly touching the liability of the respondents, the jury had been virtually required to find adversely to the petitioner, and that the instructions directed to Interrogatories 8 and 10 were prejudicially erroneous.

The answers returned to these interrogatories are of no significance. In preparing the interrogatories to be submitted, the trial court had failed to comply with the requirements of Rule 49(a) of the Rules of Civil Procedure. There is no way of knowing how the jury would have answered Interrogatories 8 and 10, had this rule been complied with. Since the jury were not required to find specially as to the several issues of negligence laid against Vaughn & Bushnell Mfg. Co., and merely an omnibus interrogatory was submitted, the jury had no way of apportioning the causal negligence between the petitioner and that respondent. And, since the jury were not even advised by the trial court of the charges of negligence laid against the respondent, Sears Roebuck & Co., and no special findings were required of the jury with respect to these issues, the jury were in no position to make an apportionment between the petitioner and this respondent. Had proper interrogatories been submitted requiring the jury to find specially as to each of the negligence charges against each of the respondents, its answer to Interrogatory 10, which the Court of Appeals concedes is objectionable in form, may, and undoubtedly would, have been different even if it were assumed that its finding with respect to Interrogatory No. 8 would have remained the same.

The failure of the trial court to comply with the requirements of Rule 49(a) left the negligence issues undetermined and deprived the jury of any means to make its apportionment.

CONCLUSION.

For the foregoing reasons, it is respectfully urged that this petition for writ of *certiorari* be granted to permit a full consideration of the important matters involved, to the end that the judgment of the Court of Appeals be reversed and the cause be remanded to the United States District Court for the Northern District, Eastern Division, with directions to grant the petitioner a new trial.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeals.

Before HASTINGS, *Chief Judge*, and KNOCH and CASTLE, *Circuit Judges*.

KNOCH, *Circuit Judge*. Plaintiff brought this action to recover damages attendant on personal injury, in loss of the sight of one eye. Plaintiff charged that defendant, Vaughn & Bushnell Mfg. Co., hereinafter called "Vaughn", who manufactured "Craftsman" hammers, and defendant, Sears Roebuck & Co., hereinafter called "Sears", who sold these hammers under the trade name, as though they were manufactured by Sears, and who prepared specifications for and supervised their manufacture, both expressly and impliedly warranted the hammers to be so manufactured and fabricated as to be reasonably fit for the purposes for which such hammers were used and free of defects rendering them inherently or imminently dangerous. He charges that they breached said warranties; that one of two such hammers purchased by him in reliance on the warranties was manufactured from defective steel stock, as a result of which it became an inherently dangerous instrumentality because it was cracked, brittle, and liable to chip, that while plaintiff was using the hammer, in the exercise of ordinary care for his own safety, the hammer chipped, and a portion of it pierced his left eye, causing the injury of which he complains.

Plaintiff lists negligent acts of Vaughn as: carelessly and negligently manufacturing the hammer, failing to use good and proper steel therefor, fabricating it from "grossly segregated and defective steel stock," failing to test it properly, improperly tempering it in manufacture, and permitting it to be sold in defective condition.

Plaintiff lists negligent acts of Sears as: carelessly and negligently permitting the hammer to be improperly manufactured, permitting it to be manufactured of defective steel stock, failing to inspect it properly, failing to test it properly, selling it in a dangerous condition, and selling an inherently dangerous instrumentality.

In their answer, defendants denied making any of the alleged warranties, and asserted that plaintiff was guilty of contributory negligence, in excess of 50% of any negligent acts committed, as a proximate result of which he had sustained the alleged injuries.

The evidence showed that Vaughn manufactured the hammer in question and that Sears sold it by catalog in which it was described as follows:

> "Perfect balance assures you of a right 'feel' and easy swing. Has flared rubber tip for sure grip. Spaced claws grip from brads up to large nails. Double steel wedge locks head tight. Head polished; beveled face resists chipping. Head is drop forged from 'superfuff' steel, heat treated and hardened. Finest grade white hickory handle. * * *"

The evidence shows no other representation made to plaintiff by either defendant.

Plaintiff testified that he was engaged in remodeling a frame structure, in Campbellsport, Wisconsin, on his own time and for his own use. He was mounted on a scaffold composed of a plank laid across two ladders, attempting to remove and preserve for future use, a 1 x 4 inch board, fastened to the studding with one or two nails on each studding, about twelve feet above the floor. With his left hand, he placed the claws of one hammer up against one of the nail heads, and (in order to drive the claws of that hammer under the nail) he struck the striking face of that hammer with the striking face of the other hammer, held in his right hand. At the second blow, he felt an

object enter his left eye. He then examined the hammers and saw that the striking face of the hammer in his right hand had chipped and the chip was missing. X-rays showed a piece of metal lodged in the back of plaintiff's left eye socket near the optic nerve.

Plaintiff testified that while he was in the hospital he (and others) were laid off by the Soo Line Railroad Company, his employer. When he was called back to work about four months later, he was discharged as being a safety hazard. He was subsequently turned down for other jobs for which he applied, but, at the time of trial, he had obtained employment as a mechanic.

The Trial Court required the jury to return a special verdict. Most of the alleged errors concern this special verdict. Plaintiff contends that the Trial Court erred (1) in failing to submit to the jury the respective issues regarding the several breaches of warranty, and the individual charges of negligence by Sears and Vaughn, as alleged in the complaint and as denied in the answer, (2) in submitting issues as to percentage of causal negligence attributable to each defendant (instead of to both together), (3) in submitting the issue of contributory negligence on the part of plaintiff, it being plaintiff's position that there was no evidence at all of any contributory negligence by him, (4) in instructing the jury so as to increase the burden of proof beyond that required by law with respect to preponderance of evidence, and (5) in failing to instruct regarding *res ipsa loquitur*. Thus plaintiff lists the contested issues as:

1. Whether the special verdict which the trial court required the jury to return conformed to the requirements of Rule 49 of the Rules of Civil Procedure.

2. Whether the answers to the questions propounded in the special verdict were responsive to the issues raised by the pleadings.

3. Whether the plaintiff was guilty of contributory negligence.

4. Whether the jury was properly instructed as to the burden of proof and the preponderance of the evidence.

5. Whether the jury was entitled to the instruction on the applicability of the doctrine of *res ipsa loquitur*.

We do not reach most of these issues because our decisions respecting issues 3 and 4 are dispositive of the whole case.

The jury found, in part, as follows:

> "8. Was the plaintiff, Eldon C. Odekirk, negligent in the manner he was using the particular hammer at the time of the accident in question? Answer: Yes.
>
> "9. If you answer Question No. 8 'yes', then answer this question: Was the negligence of plaintiff, Eldon C. Odekirk, as found by you in answer to Question No. 8, an efficient cause of the accident and of plaintiff's injuries with respect to the manner of using the particular hammer at the time of the accident in question? Answer: Yes.
>
> "10. If you answer * * * Question No. 9, 'yes', then answer this question: Taking the total causal negligence as 100%, what percentage of that total causal negligence causing the accident do you attribute to—
>
> (a) The defendant, Sears Roebuck & Co.? Answer: 0%.
>
> (b) The defendant, Vaughn & Bushnell Manufacturing Co? Answer: 0%.
>
> (c) The plaintiff, Eldon C. Odekirk? Answer: 100%."

There were conflicts in the testimony of the witnesses which raised questions of fact. However, there was ample evidence to support the findings which the jury made with respect to these questions of fact. For example, detailed evidence was submitted concerning manufacture of this

type of hammer, including test methods and inspections. Plaintiff's witness, Dr. David Joseph Mack, Professor of Metallurgical Engineering at the University of Wisconsin, testified to dirt segregation in the chipped area, which, he said, decreased the shock resistance or impact strength of the hammer. On the other hand, defendants' witnesses, Myron A. Jones, metallurgist for Youngstown Sheet and Tube Co., and Ira M. Goff, Professor of Metallurgy and Engineering at the Illinois Institute of Technology, found no defect in the hammer. Plaintiff's own testimony indicated that he did not consider the hammer warranted never to chip. When asked what he understood from the statement in the catalog, quoted above, "Beveled face resists chipping," he said that "It implied that it could chip."

Both plaintiff and defendants objected to the form of Question No. 10 in the special verdict in that it listed Sears and Vaughn separately rather than as one entity. We believe this objection had merit. If the Wisconsin Comparative Negligence Statute is applicable (Ch. 331, Sec. 331.045) then plaintiff's recovery would have been barred had his causal negligence been greater than that of the two defendants together. If the Illinois rule is applicable, contributory negligence in any degree bars recovery. In the light of the jury's finding of 100% negligence on the part of plaintiff, the separate listing proved harmless error.

Plaintiff's witness Larry Burkholter, a journeyman carpenter, of twelve years' experience, employed as a carpenter foreman at the time of the trial, testified that it was an ordinary customary procedure accepted by carpenters to strike the face of one hammer against another "to start a piece of board that is nailed securely loose from the member it is nailed to." Defendant's witness, Ernest H. Cirou, also a journeyman carpenter of eleven or twelve years' experience and an instructor of carpenter appren-

tices in a trade school since 1947, testified that attempting to get the claw of one hammer under a nail imbedded in a board by striking its face with another hammer was not a proper use of a carpenter's hammer. Edward C. Howe, Jr., an officer of Vaughn, testified that the type of hammer used here could be made to chip if struck against another hard object and that it would more readily chip if struck at an angle. Plaintiff testified that he had taken a woodworking course in high school, but that he had little occasion to use a hammer in that course. He testified further that while in the Army, he had been an aircraft mechanic and had attended aircraft school. When asked whether anyone ever told him not to hit hard metal against hard metal, he replied that he did not believe so. At the time of the injury, July 11, 1954, plaintiff had been employed by the Soo Line Railroad, since about April 19, 1954. On cross examination, plaintiff denied ever seeing instructions on proper use of tools, specifically an instruction booklet cautioning against striking one hardened surface against another hardened surface without putting a piece of copper, aluminum or wood between the surfaces to soften the blow. He said he was positive that he had no such instruction, and when shown the safety rule booklet in question, said he had received no such booklet. He did identify his signature on a receipt for a safety rule booklet dated April 19, 1954. Edmund E. Widing, Assistant Manager of Personnel and Safety for the Soo Line Railroad, testified that plaintiff had been presented with and had signed for receipt of copy No. 4385 of the safety rules booklet distributed to each new employee of the mechanical department.

We cannot agree with plaintiff's assertion that the jury's finding of negligence on his part was erroneous as a matter of law. Apart from any evidence as to instruction given plaintiff or evidence of the general practice of carpenters, the jury was given a detailed account of his actions by

plaintiff himself, including the equipment available to him, the equipment used by him, and all the attendant circumstances, from which the jury might make its own determination of fact.

All parties agree that the criterion for determination of contributory negligence is what an ordinary prudent person would or would not do under like or similar circumstances. *Ditter* v. *Yellow Cab Co.* (7 Cir., 1955), 221 F. 2d 894. On application of that criterion to the evidence adduced at the trial, the jury could properly find, as they did, that plaintiff was negligent in the manner in which he was using the particular hammer at the time of the accident.

Plaintiff contends that the jury were improperly instructed as to burden of proof and preponderance of evidence. Plaintiff objects to the Trial Court's charge as follows:

> "In the course of these instructions the terms 'burden of proof' and 'preponderance of the evidence' will be used.
>
> "I shall, during the course of these instructions, designate the party upon whom the 'burden of proof' rests with reference to the respective questions. When you are instructed that the burden of proof rests upon a party, it means that the duty devolves upon that party to satisfy or convince the minds of the jury, by a clear preponderance of the evidence of the truth of that party's contention.
>
> "By 'preponderance of evidence' is meant the evidence which possesses greater weight or convincing power. The evidence of the party upon whom the burden of proof rests must satisfy or convince the minds of the jury before the burden of proof is discharged.
>
> "The preponderance of evidence is not alone determined by the greater number of witnesses testifying to a particular fact or state of facts. It is determined

by the testimony which impresses your mind and reason as possessed of the most weight and as presents the most reasonable account of the matter in dispute."

It is the plaintiff's position that repeated use, in the above and similar instructions, of the words "satisfy", "convince", "convincing", and "clear preponderance", constituted prejudicial error. In support of this position, plaintiff cites a number of Illinois cases on the theory that in diversity cases, such as this one, the law governing burden of proof is that of the state of Illinois, the state in which the Court was sitting. *Erie* v. *Tompkins*, 304 U. S. 64 (1938). The procedural law is the law of the forum. The forum here is a federal district court, not a court of the state of Illinois. Although a state-created right may be enforced in a federal court because of diversity of citizenship, the federal court will proceed by its own rules of procedure, acquired from the federal government, and, therefore, not necessarily identical with those of the courts in the state in which the federal court is sitting. *Byrd* v. *Blue Ridge Co-op.*, 356 U. S. 525 (1958) rehearing denied 357 U. S. 933.

The District Court's charge to the jury must be considered as a whole to determine whether prejudicial error arose out of the instructions. *Affleck* v. *Chicago & N. W. Ry. Co.* (7 Cir., 1958), 253 F. 2d 249, 251. From a reading of the instructions as a whole, we see no support for plaintiff's conclusion that the jury was misled as to the burden of proof to be sustained or as to the meaning of the term "preponderance of the evidence". The jury must be satisfied or convinced that the preponderance of the evidence supports an affirmative answer before the jury may answer any question "yes". Although as a general rule it is well to avoid such terms in civil cases, the use of the words to which plaintiff objects did not, in our opinion, constitute prejudicial error in the context of the whole

charge. *Garrett* v. *DuPont* (3 Cir., 1957) 257 F. 2d 687, 691; *Burch* v. *Reading Co.* (3 Cir., 1957), 240 F. 2d 574, 579, cert. den. 353 U. S. 965; *Larson* v. *Jo Ann Cab Corp.* (2 Cir., 1954), 209 F. 2d 929, 935.

Plaintiff contends further that the jury must have been confused by the use of the term "efficient cause" for "proximate cause", and argues that while a proximate cause is an efficient cause, all efficient causes are not necessarily proximate causes.

The Court said:

> "You will observe that this question uses the words 'efficient cause'. An 'efficient cause' means an actual working cause, a cause which constitutes a substantial factor in producing an injury as an effect or a natural result thereof. In order that an injury may be said to be a natural result of negligence, there must be a close physical connection between the negligent act or omission and the injury. It must appear that the negligence of the party is a cause which actually brought about the injury as a natural result of such negligence. It is possible of course that there may be more than one cause of an injury. You are asked in this question to determine whether a specific act of negligence was one such cause."

We do not find this a confusing instruction. It seems very clearly stated.

Plaintiff also argues that the instruction following question No. 8 virtually told the jury that plaintiff had selected a dangerous way to do his work. Question No. 8 was:

> "8. Was the plaintiff, Eldon C. Odekirk, negligent in the manner he was using the particular hammer at the time of the accident in question?"

It was shortly followed by the instruction that:

> "* * * if you find from a preponderance of the credible evidence that the plaintiff had a choice of ways in which to do his work and carelessly selected

a dangerous way, he was negligent. The plaintiff was under the obligation to use for his own safety such care and caution as an ordinarily reasonable, prudent and intelligent person would have used under like circumstances. You are to determine whether the plaintiff at the time of the occurrence herein did use such ordinary care. If he did not, he was negligent.

"The defendants assert that the hammer in question was used for a purpose for which it was not intended and that in so using the hammer the plaintiff was negligent. In this regard you should take into consideration the use or uses to which an ordinarily prudent person would subject a hammer of this type. You should consider the customary use or uses to which such a hammer is ordinarily put. If it was, as defendants assert, improperly used by the plaintiff at the time of this accident, the plaintiff was negligent.

"The burden of proof on Question No. 8 is upon the defendants. If the defendants have convinced you by a preponderance of the credible evidence that Question No. 8 should be answered 'Yes' you will so answer it. If you are not so convinced, you will answer it 'No'."

We cannot agree with plaintiff's interpretation of the instruction. We find nothing in it misleading or likely to be misleading.

Other contentions advanced by plaintiff have been examined and found to be without merit.

We find no reversible error. The judgment of the District Court is

AFFIRMED.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 828

ELDON C. ODEKIRK,

Petitioner,

vs.

SEARS ROEBUCK & CO., a corporation and VAUGHN & BUSHNELL MFG. CO., a corporation,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

ADDITIONAL FACTS.

The petitioner in his complaint in the trial court charged, in substance, that the respondent, Vaughn & Bushnell Manufacturing Company, negligently and improperly manufactured the hammer in question and failed to inspect the same before sale. (A-12) As to Sears Roebuck & Company he charged in substance that it carelessly *permitted* the hammer to be improperly manufactured from defective steel; failed to properly inspect the same and negligently sold it to the plaintiff. (A 12-13)

The Complaint further charges that both Respondents *expressly* and *impliedly* warranted that the hammer was fabricated from a proper grade of steel, properly forged, tempered and constructed in a workmanlike manner and was reasonably fit for the purpose for which said hammer was intended to be used, and that both defendants breached these warranties. (A 10-11)

The evidence shows that the hammer in question was manufactured by Vaughn & Bushnell Manufacturing Company and sold by Sears Roebuck & Company by catalog as shown in the opinion of the Court of Appeals.

There is no evidence in the entire record even suggesting an express warranty by either "Bushnell" or "Sears Roebuck". The undisputed evidence shows that the accident occurred when Odekirk placed the claws of one of the hammers near the head of a nail which he was intending to remove and in so doing he deliberately struck one hammer face upon the face of the other. (A 27-28)

There is ample evidence in the record that the hammer was properly manufactured and contained no defects of any sort and that the sole cause of the occurrence was a misuse of the hammer by the plaintiff for a purpose for which it was *not* intended.

Edward C. Howe, Jr., President and Treasurer of Vaughn & Bushnell Manufacturing Company, testified in great detail on the methods used in the manufacture of the hammer in question as well as to the tests and inspections made. The evidence tends to establish that there was no negligence in the manufacturing or testing of this hammer. (A 40-78, 123)

The testimony of Myron A. Jones, a metallurgist for Youngstown Sheet & Tube Company, (A 131) and the testimony of Ira M. Goff, a professor of metallurgy and engi-

neering at the Illinois Institute of Technology tended to establish that there was no defect in the hammer. (A 124)

There is ample evidence in this record to support the special verdict that Odekirk's negligent misuse of the hammer was the sole efficient cause of the accident. Ernest Cirou, an instructor at Washburne Trade School in Chicago so testified. (A 131) Howe testified that the hammer was not intended to be used in this manner. (A 78) Edmund Widing, an assistant manager of personnel and safety for the Soo Line railroad testified that when Odekirk was employed by this company he signed a receipt for a booklet containing the safety rules for Mechanical Department employees which cautioned against the use of a hammer in the fashion used by the plaintiff in the incident in question. (Exhibit 2 for identification) (A 121-122)

Based upon the disputed questions of fact presented the trial court submitted eleven special verdicts to be answered by the jury. On these interrogatories the jury found:

1. That Vaughn & Bushnell was not guilty of any negligence in the manufacture of the hammer in question.

2. That Odekirk was guilty of negligence in the use of the hammer at the time of the accident in question and that the improper use of the hammer by Odekirk was an efficient cause of the accident. (A 179-180), and,

3. That Odekirk's misuse of the hammer constituted 100% of *the total causal negligence* causing the accident or in other words that Odekirk's negligence was the cause of the accident.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

I.

NO SUBSTANTIAL OR UNSETTLED QUESTION OF FEDERAL LAW IS INVOLVED.

Adroit counsel for Petitioner in a search for ground to justify the granting of certiorari in this case boldly states that the Petitioner's right to a jury trial has been violated by the form of special interrogatories submitted by the trial court. This contention is raised for the first time in this court and was never even suggested in the trial court or in the Court of Appeals.

The issues present in this case are uniquely narrow. The decision lacks general importance. The case was tried under the substantive law of Wisconsin and no questions of substantive Federal law is involved. The decision of the Appellate Court is not in conflict with those of other Appellate Courts and is in no sense in conflict with any decision of this court.

This is a case where the jury specifically found that the alleged injury to the Petitioner was caused solely by his own negligence, and not by any negligence on the part of either Respondents. The judgment entered in the trial court was the only judgment that could have been entered under these findings. The judgment is just and the opinion of the Court of Appeals is clearly correct.

II.

THE DECISION IS CORRECT.

A.

Petitioner complains that the trial court erred in not submitting the various elements which the plaintiff charged went to make up the allegation of negligence. In Federal Courts the form of a special verdict is governed by Rule 49 of the Rules of Civil Procedure. All that is necessary is that the court submit to the jury the *ultimate* questions of fact to which the judge can apply the law and to enter judgment. One of the ultimate factual questions was the negligence of the defendant.

The allegations concerning the manufacture and fabrication of the hammer, the use of defective steel, and failure to inspect or test said hammer were all factual elements from which the jury determines the ultimate question of the defendant's negligence. (*Pickering* v. *Corson*, 108 F.2d 546; *Allen* v. *Pennsylvania R.R. Co.*, 120 F.2d 63; *McGurty* v. *Transcontinental & Western Air*, 167 F.2d 406)

In the case at bar the court submitted to the jury the ultimate question of whether or not the defendant was guilty of negligence. The practice of requesting and giving an unreasonable number of special verdicts is condemned (*Chicago & N.W. Ry. Co.* v. *Bouck*, 1891, 33 Ill. App. 123) because it is more likely to confuse the jury than to lead to a correct result. Special verdicts should be predicated upon *basic facts* and not upon evidentiary facts. (*Vansent* v. *American Express*, 169 F.2d 355) They must relate to *ultimate and controlling facts.* The question of negligence is an ultimate fact question, and as such is properly a jury question. (*Pickering* v. *Corson*, 108 F.2d 546; *Allen* v. *Pennsylvania Ry. Co.*, 120 F.2d 63; and *McGurty* v. *Transcontinental*, 167 F.2d 406.)

The seven charges of negligence against Vaughn & Bushnell Manufacturing Company when reduced to their simplest terms charged only that this Respondent negligently manufactured the hammer in question. The seven charges include divers acts of alleged negligence, all of which are included in the general scope of the term "negligence" in the manufacturing of the hammer in question.

No Federal case has been found and none is cited which requires a Federal Court to submit separate special verdicts on each charge of specific negligence. All that is required is that the special interrogatory be directed to the material issues. The form of the interrogatory rests in the sound discretion of the trial court. (*Monrikas* v. *Vadianos*, 169 F. 2d 53; *Thorp* v. *American Aviation and General Insurance Company*, 242 F. 2d 821; *Eugenio* v. *Allis Chalmers Manufacturing Company*, 210 F. 2d 407.)

The answer of the jury to the effect that "Bushnell" was "Not Guilty" of any negligence in the manufacture of the hammer in question necessarily includes a finding that "Bushnell" was "Not Guilty" of the specific acts of negligence charged in the complaint.

This becomes crystal clear when it is considered that the Trial Court in connection with the interrogatories relating to Vaughn & Bushnell's negligence gave the following instruction:

> "It is the duty of a manufacturer to exercise care in manufacturing an article, including the selection of the materials to be incorporated into the finished product, the proper manufacturing methods designed to produce a safe product and making such inspections and tests during the course of manufacture and after the article is completed as are reasonably necessary to secure the production of a safe article. If the manufacturer fails to use such care he is negligent." (A. 147-148)

This instruction includes every act of negligence charged in plaintiff's complaint. (A 12, 13).

The decision in the instant case is not in conflict with the decision in the case of *United States Fidelity and G. Co.* v. *Commercial Nat. Bank*, 55 F. 2d 564. The case involved a suit on a policy of insurance and was decided on issues not here involved.

The case of *Tillman* v. *Great American Indemnity Company*, 207 F. 2d 588, relied upon by the plaintiff is clearly not in point nor applicable to the facts in the case at bar. That case was tried in Wisconsin under Wisconsin law. The case involved the host-guest relationship. The court held that the court should have submitted a special interrogatory as to whether the defendant exercised the degree of care required of that relationship. Obviously that was the principal material fact issue in the case.

None of the Wisconsin cases is in point because in trials in Federal Court, the procedure under which special verdicts are governed is Rule 49 of the Rules of Civil Procedure and not by the State Rules or Statutes. (*Thedorf* v. *Lipsey*, C.A. Wis., 237 F.2d 190, and *Tillman* v. *Great American Indemnity Company of New York*, C.A. Wis., 207 F.2d 588.)

The complaint that no interrogatory was submitted on the question of the negligence of Sears Roebuck & Company could in nowise prejudice the plaintiff in this action. In fact, such an interrogatory was unnecessary. Sears Roebuck's negligence, if any rests upon the allegation that they permitted the hammer to be negligently manufactured. (A 12-13)

The hammer was manufactured by "Bushnell" and not by "Sears". The jury having answered an interrogatory on the negligence of "Bushnell" in the negative an in-

terrogatory on the same subject relating to Sears Roebuck becomes immaterial for if "Bushnell" was not guilty of negligence in the manufacturing of the hammer Sears Roebuck could not be guilty of "permitting" the hammer to be negligently manufactured. (*Swift and Co.* v. *Blackwell*, 84 F. 2d 130)

B.

The Petitioner charged in his complaint that both Respondents expressly and impliedly warranted that the hammer was fit for use for the purpose for which it was intended. There is, however, not a scintilla of evidence in the entire record to even suggest that there was an express warranty on the part of either Vaughn & Bushnell or Sears Roebuck & Co. A court is not required to charge on an issue not supported by the evidence. (*Liberty Mut. Ins. Co.* v. *Arnold*, C.C.A. Tex. 1941, 118 F. 2d 47.)

On the question of an implied warranty the law of Wisconsin is well established that such a warranty does not exist between the manufacturer and the ultimate purchaser for the reason that there is no privity between the parties. (*Prinsen* v. *Russos*, 215 N.W. 905, 194 Wis. 142; *Benzor* v. *Howell*, 233 N.W. 758, 203 Wis. 1.)

The Petitioner asserts that the Complaint contained no charge based upon the theory of "*misrepresentation, fraud* or *deceit*" and that no evidence was offered on this theory of the case. The record, however, shows that plaintiff introduced in evidence the catalog of Sears Roebuck & Co. which described this hammer as follows:

> "Perfect balance assures you of a right 'feel' and easy swing. Has flared rubber tip for sure grip. Spaced claws grip brads up to large nails. Double steel wedge locks head tight. Head polished; beveled

face resists chipping. Head is drop forged from 'supertuff' steel, heat treated and hardened. Finest grade white hickory handle * * *" (See Plaintiff's Exhibit No. 5—A. 67.)

It was certainly proper under this evidence to give an instruction which used the word "misrepresentation" for the advertisement is clearly a representation and not a warranty.

The following special verdicts submitted to the jury for its determination, presented all questions of fact necessary for the judgment entered by the court on the applicable law.

Interrogatory No. 1 inquired of the jury whether Sears Roebuck & Co. through its catalog misrepresented the quality of the hammer in question to the plaintiff. This interrogatory the jury answered in the negative. This interrogatory properly submitted to the jury the question of misrepresentation as raised by the description of the hammer in the Sears Roebuck catalog. (A. 144; 178)

Interrogatory No. 6 inquired of the jury whether the Vaughn & Bushnell Manufacturing Co. was guilty of any negligence in the manufacture of the hammer. This interrogatory the jury also answered "No". (A. 147; 179)

Interrogatory No. 8 inquired of the jury whether the plaintiff was guilty of negligence in the manner in which he was using the particular hammer at the time in question. The jury answered this interrogatory in the affirmative and further found in Interrogatory No. 10 that the sole cause of the accident was the negligence of Odekirk. (A 148; 179)

The only implied warranty chargeable to Sears Roebuck was that the hammer was (1) properly manufactured and

that it was fit for the use for which it was being used at the time of the occurrence. The only negligence which the plaintiff could have been guilty of was the claimed *misuse* of the hammer. Implicit in the jury finding that the plaintiff was negligent is the finding that the hammer was not being used in the manner for which it was intended to be used. The answer to this interrogatory is fully supported in the evidence. It necessarily follows that if the hammer was not being used in the manner intended at the time of the occurrence then the warranty implied in law as to Sears Roebuck is inapplicable.

The only other phase of the supposed implied warranty on the part of Sears Roebuck involves the warranty that it was properly manufactured. This fact question is fully covered by Interrogatory No. 6, which inquired of the jury concerning the negligence of Vaughn & Bushnell Manufacturing Co. (A. 179) As Vaughn & Bushnell, the manufacturer of the hammer, was found not negligent in its manufacture, the implied warranty of Sears Roebuck is wholly inoperative.

The question of the existence of an implied warranty is a question of law for the court. The application of the fact to the law depended upon the answers of the jury to interrogatories Nos. 6 and 8. (A 179) The jury, however, answered these interrogatories in favor of the respondents and all that remained for the court was to apply the facts so found to the law and enter a judgment accordingly.

C.

The Court instructed the jury that if they were convinced by the preponderance of the evidence, they should answer the special verdicts in the affirmative. This instruction was made applicable to every special verdict

given to the jury. It was made applicable to the instructions given on negligence where the court placed the burden upon the plaintiff. It was also made applicable to the instructions relating to contributory negligence where the court instructed the jury that the burden of proof was on the defendants. Both sides were, therefore, required to prove the respective elements where the burden of proof rested upon them by convincing evidence. The instructions did not require the plaintiff to prove the allegations he was required to prove by a greater weight than was required of the defendant. The same quantum of proof in each instance was required.

It is of apparent significance that the Defendants were required to prove that the Plaintiff was guilty of contributory negligence by *convincing evidence* and that the jury, under this quantum of proof, found that the plaintiff was not only guilty of contributory negligence that was the efficient cause of the occurrence, but that his negligence constituted 100 per cent of the total negligence involved. It was, therefore, immaterial what quantum of proof was required of the plaintiff to prove that defendants were guilty of the negligence charged for as the plaintiff was proven guilty of contributory negligence by *clear* and *convincing evidence*. His negligence was the *only efficient cause of the accident*. This findings preclude a judgment in favor of the plaintiff on the charge of negligence.

A trial court is allowed great latitude in language used in instructing the jury, and all that is required is that the charge as a whole convey to the jury a clear and correct understanding of the issue, and every imaginable misapprehension need not be guarded against. *Altrichter* v. *Shell Oil Co.*, D.C. Minn. 1958, 161 F. Supp. 46.

While jurors in civil cases are not required to find the facts to an absolute certainty or even beyond a reasonable doubt as in a criminal case, it is not wrong to charge that the jury must be "convinced" by the fair preponderance of evidence that the facts were as plaintiff asserted them to be, (*Burch* v. *Reading Co.*, C.A. Pa. 1957, 240 F. 2d 574, certiorari denied 77 S. Ct. 1049, 354 U.S. 965, 1 L.Ed. 2d 914).

In the case of *Burch* v. *Reading Company*, 240 F.2d 574 error was charged with respect to an instruction given by the Court on the plaintiff's burden of proof which in effect told the jury that in order to find for the plaintiff they would have to be convinced by the preponderance of the evidence that the defendant was guilty of negligence. The court held that the instruction did not constitute error.

The Federal Rule is that there must be a conviction in the minds of the jurors before they can return a verdict in favor of the party who has the burden of proof. They must be convinced and satisfied that such party is entitled to a verdict.

In the case at bar the court fully explained to the jury the meaning of the phrase "burden of proof". He adequately pointed out and instructed the jury as to their duty to follow the preponderance of the evidence rule, and the jury was in no sense confused and in no manner prejudiced by this alleged error in the instructions.

D.

The Petitioner predicates error upon special verdict #10 (A. 150) which requested the jury to find the proportionate percentage of the total causal negligence attributed to each of the respondents and to the petitioner. It is inconceivable that the petitioner was in any manner

prejudiced by the giving of the special verdict in this form, particularly in view of the fact that the jury found that neither Sears Roebuck nor Vaughn & Bushnell was guilty of any negligence (A. 147) and that the negligence of Odekirk was the sole causal negligence producing the accident in question. (A. 149, 150)

Obviously the jury would have answered the questions in the form suggested by petitioner in the same manner. The only difference between the special verdict submitted and the special verdict tendered by the petitioner involves a matter of form. (A 160-1)

This error, if any, is innocuous. This Court is firmly committed to the harmless error doctrine. (*Donnelly* v. *Pennsylvania Ry. Co.*, 97 N.E. 2d 846; 344 U.S. 855.) A party may not complain of error which has done him no harm. *Johnson* v. *Jones*, 66 U.S. 209; *Deery* v. *Cray*, 372 U.S. 795. See also Rule 61, Title 28 U.S.C.A. p. 326.

CONCLUSION.

Petitioner's highly technical contentions afford no grounds for the granting of certiorari. The petition should be denied.

Respectfully Submitted,

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